THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

WAGGONER CARR
ATTORNEY GENERAL

September 23, 1966

Honorable Homer Garrison, Jr.
Director, Texas Department of
Public Safety
North Austin Station
Austin, Texas

Opinion No. C-766

Re: Questions relating to taking blood samples from a person suspected of driving while under the influence of intoxicating beverages.

Dear Sir:

In your opinion request you state:

"Recently this Department has been having difficulty in securing qualified persons for the purpose of securing blood samples in cases where motor vehicle operators are suspected of driving while under the influence of intoxicating beverages."

You then ask the following three questions:

"1. In those cases where the subject has consented to a blood test and a doctor is not available or refuses to take the blood from the subject so that it may be transmitted to a laboratory for testing, may a registered nurse take the blood from the subject without violating Texas laws?"

"2. In a situation similar to No. 1, may a hospital technician or laboratory technician take the blood from the subject without violating Texas laws?"

"3. Is it necessary in Texas to get the consent of the subject before taking a sample of his blood if the officer has probable cause to believe that the said subject is guilty of driving while intoxicated in violation of Articles 802, 802b or 802e, V.P.C.?"

For obvious health and evidentiary reasons, the person secured for the purpose of taking blood samples must be qualified. We assume, therefore, that your question #1 and your question #2 are directed as to whether or not the persons enumerated therein are qualified.

The answer to both of these questions is, as a class, yes. In Brown v. State, 240 S.W.2d, 310 (Tex.Crim.1951), the Court, speaking of blood tests, said:

> "When so taken by competent and trained nurses, doctors or laboratory technicians with the consent of one whose state of sobriety is questioned, the results of the test thereof may be shown by the state or by the accused. . . ."

Of course, the persons named in these two questions, i.e., registered nurses, laboratory technicians and hospital technicians, must individually be competent and trained, and it is a question of fact as to whether or not they, as individuals, actually are.

The answer to your question #3 is yes. The Court in Trammell v. State, 287 S.W.2d 487 (Tex. Crim. 1956) on these facts:

> "Officer Curtis testified that he investigated a collision and sent the appellant to the hospital in an ambulance, that he proceeded to the hospital and there saw a doctor take a sample of blood from the appellant's arm. When the State called Dr. Mason, the toxicologist, the appellant objected to his testimony as to the results of the blood test on the grounds that the State had failed to prove that the sample of blood was taken with the appellant's consent. The objection was overruled, and we have concluded that the trial court erred in so ruling. The appellant testified that he was unconscious when he

> arrived at the hospital, and there is nothing in the record to refute such testimony."

held:

> "The State having failed to show that the specimen was taken with the consent of the appellant, the testimony of Dr. Mason was not admissible." (Emphasis supplied)

The Court, relying upon the decision of the Brown case, supra, said:

> "Consent being shown, the provisions of the 5th Amendment to the Constitution of the United States and Art. 1, Sec. 10 of the Constitution of Texas, Vernon's Ann.St.Const., providing that no person shall be compelled to give evidence against himself, are not violated in the taking of blood for analysis, and the proof of the result of the test."

It is thus clear that the Court of Criminal Appeals held that the taking of blood from an accused without his consent in a case such as this was a violation of the Fifth Amendment to the United States Constitution and of Article I, Section 10, of the Texas Constitution.

We are not unmindful of the recent decision by the United States Supreme Court in Armando Schmeber v. State of California, 384 U.S. 757 (1966), where the Court held that the taking of blood without the consent of the accused, where probable cause was shown, did not violate the provisions of the Constitution of the United States; however, this action by the Supreme Court of the United States does not alter the fact that the Texas Court of Criminal Appeals has held that such action does violate our State constitution. This is a case in which our court has construed our constitution as affording more protection to an accused than has the United States Supreme Court in construing the United States Constitution.

S U M M A R Y

In those cases where a subject has consented to a blood test and a doctor is not available, or refuses to take the blood from the subject, a qualified registered nurse, hospital technician or laboratory technician may take the blood from the subject. It is necessary, in Texas, to get the consent of the subject before taking a sample of blood.

Yours very truly,

WAGGONER CARR
Attorney General of Texas

By: Robert E. Owen
ROBERT E. OWEN
Assistant Attorney General

REO/er

APPROVED:

OPINION COMMITTEE

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APPROVED FOR THE ATTORNEY GENERAL
By T. B. Wright